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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 JOHANNA EMM,

7 Plaintiff,

8 v.

9 YERINGTON PAIUTE TRIBE, *et al.*,

10 Defendants.

Case No. 3:17-cv-00614-MMD-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

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12 This Report and Recommendation is made to the Honorable Miranda M. Du, United States
13 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
14 § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

15 Before the court is Plaintiffs' Application to Proceed in Forma Pauperis (IFP) (ECF No. 1)
16 and pro se Complaint (ECF No. 1-1).

17 **I. IFP APPLICATION**

18 A person may be granted permission to proceed IFP if the person "submits an affidavit that
19 includes a statement of all assets such [person] possesses [and] that the person is unable to pay
20 such fees or give security therefor. Such affidavit shall state the nature of the action, defense or
21 appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v.*
22 *Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all
23 actions filed IFP, not just prisoner actions).

24 In addition, the Local Rules of Practice for the District of Nevada provide: "Any person
25 who is unable to prepay the fees in a civil case may apply to the court for authority to proceed
26 [IFP]. The application must be made on the form provided by the court and must include a financial
27 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

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1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
 2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 3 (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be
 4 absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
 5 335 U.S. 331, 339 (1948).

6 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 7 therefore, the application should be granted.

8 **II. SCREENING**

9 **A. Standard**

10 “The court shall dismiss the case at any time if the court determines that ... the action or
 11 appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or
 12 (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
 13 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed IFP, whether or not the plaintiff is
 14 incarcerated. *See Lopez*, 203 F.3d at 1129; *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001)
 15 (per curiam).

16 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 17 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
 18 that language. Thus, when reviewing the adequacy of a complaint under 28 U.S.C. §
 19 1915(e)(2)(B)(ii), the court applies the same standard as is applied under Rule 12(b)(6). *See*
 20 *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a
 21 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is
 22 the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”).
 23 Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of*
 24 *America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

25 In reviewing the complaint under this standard, the court must accept as true the
 26 allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts
 27 in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted).
 28 Allegations in pro se complaints are “held to less stringent standards than formal pleadings drafted

1 by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation
2 omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of
4 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative
5 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
6 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
7 cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* §
8 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state “enough facts to state a
9 claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
10 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

15 **B. Plaintiffs’ Complaint**

16 Plaintiff has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1-1.)
17 The caption names the Yerington Paiute Tribe and the Law Offices of Charles R. Zeh, Esq., as
18 defendants, but the body of the complaint also names Thom, A. Laurie (Administrator/Tribal
19 Chairwoman); Linda L. Howard (Tribal Council Member); Sandra M. Pickens (Tribal Court
20 Judge); Dr. Bruce G. Vogel (Medical Director); Timothy C. Seward (Attorney); David E. Humke
21 (Former Tribal Court Judge); D. Geoffrey D. Stommer (Attorney); Wayne M. Garcia (Former
22 Tribal Chairman 2005); and James C. Van Winkle (Judge, Tribal Court of Appeals).

23 Plaintiff’s complaint contains three counts, which she summarizes as having two
24 components. First, she seeks to restore a medical malpractice claim that she previously filed
25 against Dr. Vogel in the Yerington Paiute Tribal Court in 2007, but the complaint was dismissed
26 as untimely and for lack of jurisdiction. She appealed to the Inter-Tribal Court of Appeals, and the
27 appeal was also dismissed on May 22, 2008. Plaintiff filed another medical negligence claim in
28 tribal court on December 12, 2015, which was dismissed on res judicata grounds. She appealed

1 this determination as well, but it was also dismissed. She sought to take the matter up with the
 2 Tribal Council, but was unsuccessful. The medical malpractice actions stemmed from allegations
 3 that on November 7, 2006, Dr. Vogel negligently twisted her neck in a chiropractic manipulation
 4 that collapsed her neck, and then denied her surgery for eight months, leaving her in pain.

5 Second, Plaintiff alleges the denial of due process rights by various tribal officials in
 6 connection with the dismissal of her complaint and appeal in tribal court; failure of the tribal
 7 council to take action to rectify the matter; and, alleged retaliation for filing the complaint which
 8 she claims culminated in the arrest of her son and withholding of her pay check.

9 The court will address the claims in reverse order.

10 Plaintiff's due process claims are predicated on 25 U.S.C. § 1302(a)(8), (9). 25 U.S.C. §
 11 1301, *et. seq.*, is known as the Indian Civil Rights Act (ICRA). In enacting ICRA, Congress
 12 established a set of statutory protections for Indians against their tribal governments, which
 13 roughly parallel the constitutional rights identified in the Bill of Rights of the United States
 14 Constitution. *See Wasson v. Pyramid Lake Paiute Tribe*, 782 F.Supp.2d 1144, 1147 (D. Nev.
 15 2011). The requirements of ICRA apply to an "Indian Tribe" when exercising "powers of self-
 16 government." ICRA defines "Indian tribe" as "any tribe, band, or other group of Indians subject
 17 to the jurisdiction of the United States and recognized as possessing powers of self-government."
 18 25 U.S.C. § 1301(1). The "powers of self-government" are defined as:

19 all governmental powers possessed by an Indian tribe, executive, legislative, and
 20 judicial, and all offices, bodies, and tribunals by and through which they are
 21 executed, including courts of Indian offenses[] and ... the inherent power of
 22 Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction
 23 over all Indians.

24 25 U.S.C. § 1301(2).

25 Plaintiff invokes two of the statutory protections provided for in ICRA. Section
 26 1302(a)(8) provides, similar to the Fourteenth Amendment of the United States Constitution, that
 27 an Indian tribe, in exercising powers of self-government, shall not "deny to any person within its
 28 jurisdiction the equal protection of its laws or deprive any person of liberty or property without
 due process of law." Section 1302(a)(9) provides that an Indian tribes exercising the powers of

1 self-government shall not pass any bill of attainder or ex post facto law.

2 In *Santa Clara Pubelo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that
3 Congress did not provide for a private cause of action for violations of ICRA against the tribe or
4 its officers, except for habeas review under 25 U.S.C. § 1303 (“[T]he writ of habeas corpus shall
5 be available to any person, in a court of the United States, to test the legality of his detention by
6 order of an Indian tribe.”). The Supreme Court specifically noted that “Congress considered and
7 rejected proposals for federal review of alleged violations of [ICRA] arising in a civil context.”
8 *Santa Clara Pubelo*, 436 U.S. at 67; *see also Williams v. Pyramid Lake Paiute Tribe*, 625 F.Supp.
9 1457, 1458 (D. Nev. 1986) (“[T]he only remedy Congress intended to redress violations of ICRA
10 is a petition for a writ of habeas corpus. ...Although a Tribe is bound by ICRA, a federal court has
11 no jurisdiction to enjoin violations or to award damages for violations of that Act.”).

12 While Congress enacted ICRA to provide tribal members with certain protections available
13 under the United States Constitution, Congress was also concerned about maintaining the
14 sovereign status of a tribe to create and maintain its own government. It was this reasoning that
15 led to the determination that there could not be a private right of action for a violation of ICRA
16 except for a petition for writ of habeas corpus contesting the validity of detention by a tribe. In this
17 action, Plaintiff seeks damages, not her release from custody as she is not in custody of the tribe.
18 To the extent she contests her son’s custody, even assuming she could assert a habeas claim on his
19 behalf, the complaint alleges that her son was fined and sentenced to thirty days in jail in 2016;
20 therefore, he would no longer be in custody for this offense. Therefore, the court is without
21 jurisdiction to entertain a suit for the alleged violations of ICRA, and those claims should be
22 dismissed.

23 The court will now address Plaintiff’s complaint insofar as she seeks to restore her medical
24 negligence claim against Dr. Vogel. Plaintiff’s complaint alleges that her tribal court actions were
25 dismissed, at least in part, on the ground that the tribal court did not have jurisdiction because
26 Dr. Vogel was a federal employee under the Federal Tort Claims Act (FTCA). Therefore, the court
27 will construe Plaintiff’s pro se complaint as asserting a medical negligence claim under the FTCA
28 against Dr. Vogel.

1 In enacting the FTCA, Congress abrogated its sovereign immunity from suit in part to
2 provide that the United States may be liable for damages for negligent torts committed by its
3 employees (or certain independent contractors) acting within the scope of their employment “under
4 circumstances where the United States, if a private person, would be liable to the claimant in
5 accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1).
6 Congress extended the FTCA to negligent acts of Tribal contractors carrying out contracts, grants,
7 or cooperative agreements pursuant to Public Law 93-638, the Indian Self-Determination and
8 Education Assistance Act. *See* 25 U.S.C. § 5321(d), 25 U.S.C. § 5396.

9 In the event Dr. Vogel was a tribal employee, tribal employees are deemed federal
10 employees for purposes of the FTCA while acting within the scope of their employment in
11 “carrying out” contracts or compacts under the Indian Self-Determination and Education
12 Assistance Act, or there is a personal services contract with the tribe and the services are provided
13 in a facility owned, operated or constructed under jurisdiction of Indian Health Service (an agency
14 within the Department of Health and Human Services).

15 The complaint poses some questions about whether Plaintiff exhausted her administrative
16 remedies with the applicable federal agency, in this case, the Department of Health and Human
17 Services, and whether her claim is barred by the statute of limitations, but because the answers to
18 these questions are not clear from the face of the complaint, they do not serve as a basis for
19 dismissal at this juncture.

20 A claimant under the FTCA is required to first file an administrative tort claim with the
21 applicable federal agency. 28 U.S.C. § 2675(a). The statute of limitations for claims brought under
22 the FTCA is two years from the incident or when the claimant has knowledge of the alleged injury.
23 28 U.S.C. § 2401(b). This would seem to preclude Plaintiff’s claim at this late juncture, but this
24 conclusion does not take into account any applicable tolling of the statute of limitations. It should
25 be noted that once an administrative tort claim is filed with the agency, the claimant must wait six
26 months for the government to conduct its administrative review. If the case is not resolved during
27 that six-month review period, the claimant may file suit at any time. If the government denies the
28 administrative claim, suit must be filed within six months of the date of denial.

1 What is problematic for Plaintiff, however, is that Plaintiff's exclusive remedy under the
 2 FTCA is a federal tort claim against the United States. The purported employee, Dr. Vogel, is
 3 immune from civil liability. 28 U.S.C. § 2679. As a result, the FTCA claim should be dismissed
 4 as to Dr. Vogel.

5 A pro se litigant should be allowed leave to amend his complaint to name the proper party,
 6 unless it is clear no amendment could cure the defect. Therefore, Plaintiff should be given leave
 7 to amend to assert the FTCA medical negligence claim against the proper party—the United
 8 States. Plaintiff should keep in mind the administrative hurdles discussed above in determining
 9 whether to file an amended complaint. In other words, if Plaintiff determines that she did not file
 10 an administrative tort claim with the agency within two years of the incident (which, construing
 11 the allegations liberally, Plaintiff alleges occurred between 2006 and 2009), or did not adhere to
 12 the requirements for filing suit after the six-month administrative review period, it is likely any
 13 amended complaint would ultimately be dismissed.

14 **III. RECOMMENDATION**

15 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order:

16 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain
 17 this action without the necessity of prepayment of fees or costs or the giving of security therefor.
 18 This order granting IFP status does not extend to the issuance of subpoenas at government expense.

19 (2) Directing the Clerk to **FILE** the complaint (ECF No. 1-1);

20 (3) **DISMISSING** the ICRA claims **WITH PREJUDICE**;

21 (4) **DISMISSING** the FTCA medical negligence claim against Dr. Vogel, but **WITH**
 22 **LEAVE TO AMEND** to assert the claim against the proper party—the United States.

23 (5) Plaintiff should be given thirty days leave to amend from the date any order adopting
 24 and accepting this Report and Recommendation is filed. Plaintiff should be advised that a failure
 25 to timely file an amended complaint will result in dismissal of the action.

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1 Plaintiff should be aware of the following:

2 1. That she may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of receipt. These objections should be titled
4 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by
5 points and authorities for consideration by the district judge.

6 2. That this Report and Recommendation is not an appealable order and that any notice of
7 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
8 until entry of judgment by the district court.

9 DATED: March 28, 2018.

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11 WILLIAM G. COBB
12 UNITED STATES MAGISTRATE JUDGE
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